Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	)	CC Docket No. 95-20

REPLY COMMENTS OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION

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TABLE OF CONTENTS

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The California Cable Television Association ("CCTA") hereby submits reply comments in the above-captioned proceeding. CCTA is a trade association representing cable television operators with over 400 cable television systems in California, including both small rural systems and national multiple system operators, as well as cable television programmers and suppliers. CCTA's reply comments focus primarily on the arguments made by Pacific Bell ("Pacific") that structural separation should not be imposed on local exchange carriers ("LECs") providing enhanced services.

Introduction and Summary

Last fall, the United States Court of Appeals for the Ninth Circuit vacated the Commission's latest order authorizing structural integration and remanded the case to the Federal Communications Commission ("FCC" or "Commission").[1] In so doing, the Court made abundantly clear that the FCC had not adequately

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[1] California v. FCC, 39 F.3d 919 (9th Cir. 1994); cert. denied, 115 S.Ct. 1427 (1995) ("California III").

weighed the costs and benefits of abandoning its system of structural separation.

The proponents of so-called nonstructural "safeguards" apparently fail to acknowledge this adverse court decision. Pacific, for example, incomprehensibly argues in the very first sentence of its comments that "[e]vents have proven that the Commission was correct in the Computer III proceeding, and again in the Remand proceeding, when it decided that the public interest benefits of integration far outweigh any potential costs."[2]

Events have proven exactly the opposite. Over the years, the LECs have demonstrated that they have both the motive and means to behave anticompetitively under a system of non-structural "safeguards." At the same time, there has been no demonstration of significant benefits to consumers as a result of structural integration. This is especially the case in the context of LEC-provided video services, where the LECs' incentive and ability to discriminate and cross-subsidize is very strong and the burdens of structural separation are virtually non-existent.

Accordingly, to prevent LECs from gaining an unfair and undeserved advantage over other providers, CCTA urges the

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[2] Comments of Pacific and Nevada Bell on the Notice of Proposed Rulemaking, CC Docket No. 95-20 at 4 (Summary) and 1 (filed April 7, 1995) ("Pacific Comments"). Not only does Pacific ignore the court's holding, but it takes this opportunity to ask for additional relief from the already minimal non-structural requirements. Id. at 70.

Commission to require LECs to provide video services through fully-separated subsidiaries.

I. Non-Structural "Safeguards" Do Not Provide Adequate Protection

Pacific's insistence that market forces make it impossible for the company to behave anticompetitively ignores reality.[3] Indeed, CCTA has pointed to number of instances of LEC access discrimination and cross-subsidization under a regime that prohibited LECs from providing video programming to their in-region subscribers.[4] Anticompetitive behavior has taken the form of questionable arrangements with "favored" programmers, charging rates that fail to cover costs, and limiting access to poles and conduits.[5] In the face of all this evidence, it is absurd for Pacific to argue that discrimination and cross-subsidization cannot occur.

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[3] Pacific Comments at 4.

[4] CCTA Comments, CC Docket No. 95-20, at 10-13 (filed April 7, 1995). While CCTA has confined its discussion to anticompetitive LEC conduct in the video services industry, a number of other commenters point to numerous examples of LEC discrimination against competing enhanced services providers. See e.g., Comments of the Newspaper Association of America, CC Docket No. 95-20 (filed April 7, 1995); Comments of MCI Telecommunications Corporation, CC Docket No. 95-20 (corrected copy filed April 10, 1995). Moreover, the Ninth Circuit Court of Appeals concluded that "the BOCs have the incentive to discriminate and the ability to exploit their monopoly control over the local networks to frustrate regulators' attempts to prevent anticompetitive behavior." California III, 39 F.3d at 929.

[5] CCTA Comments at 10-13.

Moreover, Pacific's argument that growth in the markets for enhanced services and network services lessens LEC ability to discriminate is flawed.[6] Even assuming the enhanced services market is flourishing, as Pacific alleges, that would not reduce the LECs' incentive to use their telephone network monopolies to advantage their owned or affiliated providers. Indeed, as we previously noted, the intense competition in the video services industry exacerbates the LECs' desire to seek a leg up over competing operators.[7]

Similarly, Pacific's argument that increased local competition for network services warrants abandonment of the separate subsidiary requirement rings hollow.[8] Competitors have barely nibbled away at the edges of the local telephone franchises, if at all,[9] and the LEC monopoly remains noticeably undiminished to date. Indeed, it has been reported that aggregate revenues for access services of all Competitive Access Providers ("CAPS") combined are less than one percent of total monopoly LEC access revenues and an even smaller percentage of

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[6] Pacific Comments at 7-27.

[7] CCTA Comments at 10.

[8] Pacific Comments at 28.

[9] In California, local telephone companies retain a de jure monopoly, In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers, CPUC Docket No. D89-10-031, and are resisting efforts to open up the local exchange market to meaningful competition. See n.16, infra.

total revenues.[10] As the Ninth Circuit noted not too long ago, "'bottleneck monopolies continue to exist as before,' and 'the ability to exploit the bottlenecks anticompetitively has remained precisely the same.'"[11] Despite Pacific's claims to the contrary, LECs today retain the ability to leverage their monopoly control in the market for network services to gain power in the video services market.

Finally, despite Pacific's claims of increased network unbundling, the Commission acknowledges, and the Court confirms, that the FCC's original conception of Open Network Architecture ("ONA") has been substantially diluted.[12] The goal of ONA, as articulated in Computer III, was to make access to telephone transmission facilities as available to enhanced services providers ("ESPs") as it was to the BOCs themselves.[13] As the Ninth Circuit recognized, the FCC retreated from its position that full ONA was a prerequisite for eliminating structural separation to ensure access to the BOCs' networks.[14] Although it has been almost a decade since the FCC embraced the ONA concept in its Computer III ruling, most ONA issues remain unresolved and

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[10] Economics and Technology, Inc./Hatfield Associates, Inc., "The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers," at ii (February, 1994).

[11] California I, 905 F.2d at 1235.

[12] California III 39 F.3d at 930.

[13] California v. FCC, 4 F.3d 1505, 1509 (9th Cir. 1993) ("California II").

[14] California II, 4 F.3d at 1512; California III, 39 F.3d at 922.

ONA, in its current form, does not permit ESPs to choose only those network elements they want. Indeed, the ONA of today provides virtually no protection from access discrimination.[15] Thus, Pacific's curious assertion that the current level of unbundling justifies full structural relief should be rejected.[16]

For all of these reasons, the State of California has argued to the Commission that a LEC's video operations should be contained in a separate subsidiary that "would be treated similarly to other programmers utilizing video dialtone platform services."[17] California is concerned that "uncontrolled merger of the programming and common carriage functions of a single entity would dramatically increase the incentive and opportunity

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[15] California III, 39 F.3d at 930 ("[t]he FCC has similarly failed to provide support or explanation for some of its material conclusions regarding prevention of access discrimination.").

[16] Significantly, Pacific has resisted any meaningful unbundling of its network and the establishment of rules for local competition at every opportunity. In its January 31, 1995 filing before the California Public Utilities Commission ("CPUC"), Pacific proposed to provide only loops and ports, and then at a rate that substantially exceeded the retail rate for Pacific's complete local exchange service. See Comments of Pacific in CPUC Local Rules Docket No. 1.87-11-033 (January 31, 1995). Pacific has also opposed any facilities-based competition, suggesting only resale of its services. Notably, Pacific opposed the CPUC's proposed local competition rules, which included unbundling of "(1) subscriber loops; (2) line side ports; (3) signaling links; (4) signal transfer points; (5) service control points; and (6) dedicated channel network access connection. R.95-04-043, 1.95-04-044 (April 26, 1995). These proposed rules represent a first step toward a local telephone competitive market in California.

[17] Response of the People of the State of California and the Public Utilities Commission of the State of California to Comments on the Fourth Further Notice of Proposed Rulemaking, CC Docket No. 87-266, at 3-5 (filed April 10, 1995).

for video dialtone providers which provide their own programming to discriminate against unaffiliated video programmers."[18]

Congress, the Department of Justice ("DOJ"), and the Court administering the Modified Final Judgment ("MFJ") have also expressed a preference for structural separation when BOCs enter competitive markets, including the video services market. For example, pending legislation in Congress conditions BOC provision of cable or video services on the establishment of separate subsidiaries.[19] Similarly, as part of a recent agreement with DOJ, Ameritech has agreed to form a separate subsidiary for the purpose of providing long distance service on a supervised trial basis.[20] And, the MFJ Court's recent decision to allow BOC cellular subsidiaries to resell interLATA interexchange services to their cellular customers concluded that structural separation would "reduce the risk of discrimination" and "of cross-subsidization, that is, the risk that the Regional Companies would use profits obtained from the provision of local service to

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[18] Id.

[19] See Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong., 1st Sess. § 252; Communications Act of 1995, H.R. 1555, 104th Cong., 1st Sess. § 652.

[20] See Preliminary Memorandum of the United states in Support of Motion for a Modification of the Decree to Permit a Trial, Supervised by the Department of Justice and the Court, in which Ameritech Could Provide Interexchange Service for a Limited Geographical Area, With Appropriate Safeguards, When Actual Competition and Substantial Opportunities for Additional Competition in Local Exchange Service Develop. Civil Action No. 82-0192, filed April 3, 1995. Ameritech's agreement with DOJ demonstrates that a separate subsidiary requirement is not excessively burdensome when LECs are entering competitive markets.

lower the price of more competitive long distance service."[21] The Court stated that while the separate subsidiary requirement is not a "cure-all for attempted or anticipated anticompetitive conduct . . . it would, at a minimum, complicate the task of discrimination and cross-subsidization."[22]

In fact, some of the LECs themselves have acknowledged that separate subsidiaries are appropriate in certain circumstances. NYNEX, for instance, apparently recognizes the difference between video services and other enhanced services for purposes of separate subsidiaries. While it argues vociferously in this proceeding that structural separation is not necessary, it has previously stated that it is not opposed to separate subsidiaries for video services.[23]

The experience of CCTA's members and others under a non-structural regime demonstrates that LECs have the motive and opportunity to behave in a manner designed to maintain their monopoly control and discriminate in favor of their affiliates. Structural separation for video services is therefore a crucial step toward the development of truly competitive markets.

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[21] United States v. Western Electric Company, Inc., Civil Action No. 82-0192 (HHG) at 16-17 (D.D.C. April 28, 1995).

[22] Id.

[23] See NYNEX Comments, CC Docket 95-20 (filed April 7, 1995). Compare In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Comments of NYNEX, at 3, 6 (filed March 21, 1995).

II. Creating Conditions that Favor a Monopoly Market is Contrary to the Public Interest

Surprising only for its candor, Pacific presents the long-rejected telephone company argument that monopoly is better for consumers than competition. Indeed, in contending that BOCs are the only companies capable of providing voice messaging services on a cost-effective basis, Pacific's economists state that "even in the most extreme case, a monopolist creates significant consumer welfare when it introduces a new good."[24]

Quite possibly, a nonstructural approach might have a positive effect on LEC profits. The Commission should not accept the argument, however, that putting the LECs in a position where they can easily discriminate against competitors without detection is good for the public.

Moreover, the telephone companies have not demonstrated that consumers actually have benefitted or will benefit from abandonment of structural separation. Pacific argues that the largest cost of structural separation is a delay in the introduction of new services, and alleges that voice mail service would not have been offered without BOC entry on a non-structural basis.[25] Empirical evidence does not support this argument. As noted in CCTA's initial comments, the California III Court expressed deep skepticism about the FCC's reliance on the voice mail example to bolster its analysis of the costs of structural

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[24] Pacific Comments, Exhibit A at 15.

[25] Id. at 71 and Exhibit A at 10-15.

separation.[26] In addition, Pacific's economic study is suspect because it neglects to distinguish between the delay attributable to the MFJ's ban on BOC-provided information services and that caused by structural separation.[27] The MFJ's absolute prohibition played a substantially greater role in the BOCs' failure to provide voice messaging service than the relatively minor FCC regulatory hurdle of separate subsidiaries. Finally, Pacific has not shown that other ESPs could not have offered the service at competitive rates if they had been given non-discriminatory access to LEC network services and features.

In any event, the alleged consumer benefits of structural integration are not applicable to LEC provision of video services. The video services market is mature and thriving and numerous competitors continually are introducing new services and products. Therefore, LECs cannot argue that entry on a non-structural basis is necessary to ensure that the public receives the benefit of innovation.[28]

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[26] CCTA Comments at 6-7, citing California III, 39 F.3d at 930.

[27] Pacific Comments, Exhibit A at 10, 15.

[28] Moreover, given the current LEC proposals to become video programmers and to offer video services, it would be hard for them to argue that their presence is needed in the market to ensure innovation. Many LECs have failed to live up to initial promises of vast channel capacity and, instead, have offered much of their limited space to favored anchor programmers. See In the Matter of the Applications of Contel of Virginia, Inc. doing business as GTE Virginia, et al., File Nos. W-P-C 6955 et al., Mimeo. at 18-19 (released May 5, 1995)("The Bureau finds that GTE's proposal to allow one customer-programmer to acquire 60% of available analog capacity, exclusive of shared channels, is inconsistent with the Commission's underlying policy that the

Likewise, Pacific's claims of joint economies or efficiencies are not pertinent here. The functions of a video programmer -- including packaging, tiering, program production -- are not related to the functions of telephone service provider and, thus, there is no economic or efficiency reason to combine the functions. It appears that the real efficiency referenced by the LECs in this context is the opportunity to gain an unfair advantage over competing providers.

Similarly, Pacific's argument that it will incur costs if it is required to move from an integrated operation to structural separation are inapplicable with regard to the video services market.[29] Because LECs are just now entering the video business, there will be no financial costs associated with "eliminating the attributes of integration."[30] Nor will there be any interruption of service to customers and a corresponding potential loss of good will.[31]

In sum, Pacific has failed to show that any consumer benefits will flow from permitting structural integration of LEC video and network services.

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platform provider not allocate all or substantially all analog capacity to a single programmer."); see also S. Kinsman, "Cable Groups Challenged Video Trial," The Hartford Courant, at F1 (April 7, 1995)(CAI Wireless, Inc. has publicly acknowledged that it has a pre-existing agreement with The Southern New England Telephone Company ("SNET") to program a 40 channel cable-like package on SNET's video dialtone system).

[29] Pacific Comments at 72.

[30] See id.

[31] Id.

III. More, Rather than Less, Protection Is Needed

Just last month, Pacific announced that it paid $175 million for the stock and debt of the nation's fourth-largest wireless operator, Cross Country Wireless.[32] This acquisition enables Pacific to reach 5 million total subscribers[33] and 2.3 million additional homes that would not be reached by its planned video dialtone network.[34] In addition to its purchase of Cross Country Wireless, Pacific is building its video dialtone network in California, which has not, as yet, been approved by the FCC. It expects that five and a half million homes will be passed by its video dialtone network in San Jose, Los Angeles, Orange County and San Diego by the year 2000.[35] At that point, the telephone company could easily migrate the millions of overlapping subscribers from the wireless system to the video dialtone network in a process that will probably be transparent to the subscribers. As a result, Pacific gets large scale, inexpensive entry into the video market without the safeguards that currently apply even to video dialtone.

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[32] Brown, Rich, "MMDS Wireless Viable: A Capital Idea," Broadcasting & Cable at 16 (May 1, 1995).

[33] Tobenkin, David, "The Wireless System that Could, Cross Country Wireless Cable's Success," Broadcasting & Cable at 20 (May 1, 1995).

[34] Brown, Rich, "MMDS Wireless Viable: A Capital Idea," Broadcasting & Cable at 16 (May 1, 1995).

[35] See Application, W-P-C 6913, at 11 filed December 20, 1993; Application, W-P-C 6914, at 11 filed December 20, 1993; Application, W-P-C 6915, at 11 filed December 20, 1993; and Application, W-P-C 6916, at 11 filed December 20, 1993.

This scenario, CCTA submits, requires the Commission to consider separate subsidiaries for all LEC-provided video services. Unlike cable operators, telephone companies today enjoy complete freedom to enter the wireless cable market in their own regions.[36] There is no reason that Pacific should be permitted to use its regulated services monopoly to compete unfairly against California's other video providers, whether it be through a traditional cable system, a video dialtone system, or a wireless cable system.

In this regard, CCTA reiterates its concern that the more favorable access to customer proprietary network information granted to LECs under the FCC's rules deters the development of a truly fair and open video market. To avoid skewing the market further in favor of one competitor, it is absolutely essential that competing video providers obtain equal access to such important information.

CONCLUSION

The fresh cost-benefit analysis required by the Ninth Circuit Court of Appeals demonstrates that the public interest supports imposing structural separation in the context of LEC-provided video services. Without separate subsidiaries, telephone companies will be able to engage in wide-spread, undetected, access discrimination and cross-subsidization, to the detriment of consumers and competing video providers. Thus, for

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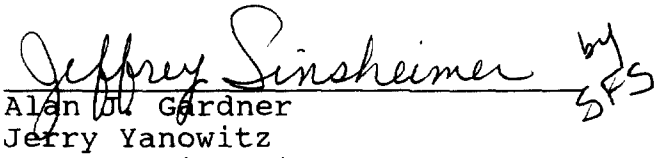
[36] See 47 U.S.C. § 533(a)(2).

the foregoing reasons, and the reasons set forth in CCTA's initial comments in this proceeding, CCTA urges the Commission to impose a structural separation requirement on telephone company provision of video services.

Respectfully Submitted,



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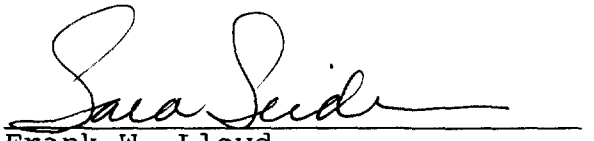

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CERTIFICATE OF SERVICE

I, James Waddy, hereby certify that on this 19th day of May, 1995, I caused copies of the foregoing Comments of The California Cable Television Association in CC Docket 95-20 to be sent by First Class mail, postage prepaid, or to be delivered by messenger (*) to the following:

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